

6.0 COMPLIANCE WITH THE FEDERAL AND CALIFORNIA ENDANGERED SPECIES ACTS AND NATURAL COMMUNITY CONSERVATION PLANNING ACT

6.1 PROGRAMMATIC COMPLIANCE

CALFED will comply with FESA for adoption of CALFED actions through programmatic FESA Section 7 consultations with USFWS and NMFS. The MSCS will serve as the biological assessment of CALFED in support of the programmatic Section 7 consultations. USFWS and NMFS will use the MSCS's biological information to prepare programmatic biological opinions. These programmatic opinions will be complete before the federal CALFED lead agencies issue a Record of Decision (ROD). The MSCS will also be submitted to DFG for approval as a programmatic NCCP. DFG's programmatic determination regarding the MSCS will be made at the time the State CALFED lead agencies issue a Notice of Determination (NOD) for CALFED as a whole.

Neither the programmatic biological opinions nor the programmatic NCCPA determination will authorize take of MSCS evaluated species. Instead, as discussed below, take authorization for entities implementing CALFED actions will follow a simplified compliance process that tiers from the programmatic consultations. The subsequent compliance process for some CALFED actions or groups of actions may be complete shortly after CALFED issues the ROD and NOD, depending on the level of detail available about each action and its environmental effects. (See Section 6.2 below for a discussion of take authorization.)

Figure 6-1 illustrates the relationship between FESA, CESA, and NCCPA compliance for CALFED and compliance for individual CALFED actions.

Because of the varying levels at which CALFED actions are currently defined, and the need for additional biological data for some species, the programmatic MSCS does not provide the specificity of detail needed to allow for full compliance with FESA, CESA, and NCCPA for any specific CALFED action. Additional information will be required for USFWS, NMFS, and DFG to ascertain each CALFED action's specific impacts on species to the extent required by FESA, CESA, and NCCPA. The MSCS, the programmatic biological opinions, and DFG's NCCPA determination will serve as the basis for a simplified compliance process that will help assure that CALFED actions can be completed in accordance with FESA, CESA, and NCCPA, and that regulatory compliance will be systematic, efficient, and predictable.

6.1.1 SIMPLIFIED COMPLIANCE PROCESS

Entities implementing CALFED actions will comply with FESA, CESA, and NCCPA through a simplified compliance process that tiers from the programmatic consultations. Entities implementing actions that may affect an evaluated species will be required to prepare an ASIP for each proposed action or group of actions. The ASIP will be based on and tier from the data, information, analysis, and conservation measures in the MSCS. The implementing entity will coordinate development of the ASIP with USFWS, NMFS, and DFG to ensure that the ASIP incorporates appropriate conservation measures for the proposed CALFED action(s), consistent with the MSCS.

USFWS and NMFS will review the ASIP for compliance with FESA, primarily under Section 7. They will consider issuing a FESA Section 10(a)(1)(B) permit if a nonfederal entity proposes to implement one or more CALFED actions that are not authorized, funded, or carried out by a federal agency. The ASIP will contain all information required for compliance under either FESA Section 7 or FESA Section 10(a)(1)(B). USFWS and NMFS may also use Section 10 or Section 7 of FESA to authorize take of species evaluated in the MSCS but not included in the federally covered species list in the programmatic biological opinions.

DFG will review the ASIP for compliance with NCCPA. For CALFED actions that may affect species that are listed under CESA, but are not State-covered species under DFG's programmatic NCCP determination, the ASIP may also be used as the basis for obtaining an incidental take permit pursuant to Section 2081(b) of the California Fish and Game Code.

6.1.2 TIMING OF ACTION SPECIFIC IMPLEMENTATION PLANS FOR CALFED ACTIONS

ASIPs will be developed for individual CALFED actions or groups of actions when enough detailed information is available about the actions to analyze fully their impacts on evaluated species and habitats. A CALFED action will be adequately defined when:

- sufficient detail exists about the nature, scope, location, and timing of the action; and
- sufficient site-specific biological data is available.

Some CALFED actions are relatively well-defined at the programmatic level. For those actions that have a significant amount of definition and are analyzed in detail in the MSCS and the Programmatic EIS/EIR, it is expected that CALFED could develop and complete an ASIP expeditiously after issuing the ROD and NOD.

For CALFED actions that are less well defined at the programmatic level, an ASIP could be developed only after the implementing entity has refined the action and produced information on the nature, scope, location, timing and impacts of the action, as well as any additional required biological data.

6.1.3 ACTION SPECIFIC IMPLEMENTATION PLANS

To fulfill the requirements of FESA Sections 7 and 10 and California Fish and Game Code Sections 2835 and 2081, as applicable, each ASIP must adhere to the following outline:

- a detailed project description of the CALFED action or group of actions to be implemented, including site-specific and operational information;
- a list of evaluated species and any other special-status species that occur in the action area;
- an analysis identifying the direct, indirect, and cumulative impacts on the evaluated species, other special-status species occurring in the action area (along with an analysis of impacts on any designated critical habitat) likely to result from the proposed CALFED action or group of actions, as well as actions related to and dependent on the proposed action;
- measures the implementing entity will undertake to avoid, minimize, and compensate for such impacts and, as appropriate, measures to enhance the condition of NCCP communities and evaluated species, along with a discussion of:
 - a plan to monitor the impacts and the implementation and effectiveness of these measures,
 - the funding that will be made available to undertake the measures, and
 - the procedures to address changed circumstances;
- measures the implementing entity will undertake to provide commitments to cooperating landowners, consistent with the discussion in Section 6.3.5 below;
- a discussion of alternative actions the applicant considered that would not result in take, and the reasons why such alternatives are not being utilized;
- additional measures USFWS, NMFS, and DFG may require as necessary or appropriate for compliance with FESA, CESA, and NCCPA; and

- a description of how and to what extent the action or group of actions addressed in the ASIP will help CALFED achieve the MSCS's goals for the affected species (i.e., how the ASIP implements the MSCS).

The ASIPs will be based in large part on the biological data, CALFED information, impacts analysis, and conservation measures in this MSCS. The ASIPs must be consistent with the species goals, prescriptions, and conservation measures in the MSCS for evaluated species affected by the proposed CALFED actions. Additional information and analysis will be required for many actions. Further, to fully comply with FESA, CESA, and NCCPA for a CALFED action, USFWS, NMFS, and DFG may require the ASIP to include additional measures for certain listed species or species proposed for listing if, for any reason, the species were not evaluated in this MSCS. The MSCS will assist an implementing entity in preparing an ASIP by offering programmatic information on the expected impacts of CALFED actions on species and habitats and programmatic conservation measures for those impacts.

The ASIPs will not address all regulatory and permitting needs for CALFED actions. Rather, nearly all CALFED actions will require environmental review and permitting under other State and federal laws before they can be implemented. CALFED is developing a coordinated environmental review and permitting process for its actions, which includes the MSCS's simplified process for complying with FESA, CESA, and NCCPA. USFWS, NMFS, and DFG are currently developing methods to streamline their own agency review of CALFED actions for different permit requirements (e.g., to coordinate review of ASIPs with streambed alteration agreements under California Fish and Game Code Sections 1601 and 1603).

6.2 COVERED SPECIES

Covered species are discussed in Chapter 2, "Natural Communities, Evaluated Species, and Baseline Conditions". Chapter 3, "Summary Description of CALFED Elements", describes the process for screening species, developing the preliminary species list, and selecting evaluated species. Federally covered species are federally listed and proposed species identified by USFWS and NMFS in the programmatic biological opinions. State-covered species are species identified by DFG in the programmatic NCCP determination.

6.2.1 INCIDENTAL TAKE AUTHORIZATION FOR COVERED SPECIES

USFWS, NMFS, and DFG can authorize the incidental take of covered species under FESA, CESA and NCCPA based on the MSCS and ASIPs submitted by the proponents of specific CALFED actions.

USFWS and NMFS will evaluate each ASIP pursuant to Section 7 and/or Section 10(a) of FESA. The resulting action specific analysis for the evaluated species will be predicated on the programmatic biological opinions for CALFED. The action specific analysis will evaluate each ASIP to determine whether the ASIP, in conjunction with the MSCS, complies with Section 7 and/or Section 10(a) of FESA. If an ASIP meets Section 7 and/or Section 10(a) requirements, the incidental take of federally covered species may be authorized.

DFG will evaluate each ASIP to determine whether the ASIP, in conjunction with the MSCS, meets the requirements of NCCPA. If an ASIP meets NCCPA requirements, DFG will provide to the proponent of the specific CALFED action(s) an NCCPA take authorization for State-covered species. If the CALFED action addressed in the ASIP may affect State-listed species that are not State-covered species, DFG will also determine whether the ASIP meets the requirements of Section 2081(b) of CESA and can authorize incidental take of such species accordingly.

6.2.2 COVERED SPECIES FOR WHICH TAKE MUST BE AVOIDED

Species that are extremely rare or limited in distribution may be included as State-covered or federally covered species. The MSCS specifies that mortality of such species that could be caused by CALFED actions must be avoided (see Table 4-5 for a list of these species). However, it is possible that some limited types of take (e.g., harassment) can be authorized to ensure that entities implementing CALFED actions are in compliance with FESA and CESA.

The take of other species must be avoided because of laws prohibiting DFG from authorizing the take of such species (e.g., see California Fish and Game Code Sections 3511, 4700, 5050, and 5515 for lists of fully protected species).

6.2.3 MODIFICATIONS TO COVERED SPECIES LIST

If a species that is not a covered species, but that is known to occur or has the potential to occur in the Focus Area, is proposed for listing pursuant to FESA or CESA, then USFWS, NMFS, and DFG will determine whether additional conservation measures beyond those described in the MSCS are necessary to comply with FESA and NCCPA. If additional measures are not necessary, the species will be added to the State-covered and/or federally covered species lists, and take of such species may be authorized with other covered species pursuant to ASIPs approved by USFWS, NMFS, and DFG.

If additional measures are necessary, USFWS, NMFS, and DFG will work with CALFED and entities implementing CALFED actions to identify and implement the necessary measures. If USFWS, NMFS, and DFG determine that additional measures are necessary, they shall give preference where possible to measures that do not increase restrictions on the use of land or water. Once the additional measures are identified, they will be incorporated into the MSCS and the new

species will be added to the State-covered and/or federally covered species lists. Take of the species may thereafter be authorized pursuant to ASIPs approved by USFWS, NMFS, and DFG.

If it is not practicable to revise the MSCS to allow for the addition of the species, USFWS, NMFS, and DFG, during review of the ASIPs, will determine the additional measures necessary to avoid, minimize, and compensate for impacts on the species. In such cases, in addition to determining whether the ASIP implements the MSCS with respect to the covered species, USFWS, NMFS, and DFG will determine whether the ASIP adequately addresses the impacts on the new species. If USFWS, NMFS, and DFG determine that additional measures are necessary, they shall give preference where possible to measures that do not require further restrictions on the use of land or water. The additional measures may be identified by USFWS, NMFS, and DFG at or after the time the species is proposed for listing.

6.3 IMPLEMENTATION

6.3.1 ENTITIES THAT WILL IMPLEMENT CALFED ACTIONS AND THE MULTI-SPECIES CONSERVATION STRATEGY

CALFED contains hundreds of individual actions that will be implemented over a period lasting at least 30 years. Implementation will be guided by the implementation plan, which describes the near-term and long-term vision for CALFED implementation that is included as an appendix in the Programmatic EIS/EIR.

The MSCS contains two types of conservation measures for achieving MSCS species goals:

- measures to avoid, minimize and compensate for CALFED's adverse effects on NCCP communities and evaluated species; and
- measures to enhance NCCP communities and evaluated species that are not directly linked to CALFED's adverse effects.

The first type of measures is designed to offset CALFED's adverse effects and will be undertaken by the entities implementing CALFED actions. The precise measures necessary to avoid, minimize, and compensate for the adverse effects of individual CALFED actions or groups of actions will depend on the scope, location, and timing of the action(s), as well as the current status, distribution, and needs of the affected species and habitats.

The second type of conservation measures generally represents refinements to portions of the ERP, Water Quality, Levee System Integrity, and CMARP elements of CALFED that will be beneficial to NCCP communities and evaluated species. These enhancement measures will be

undertaken by many different entities, including CALFED agencies and other entities participating in the program.

The MSCS conservation measures do not comprise all actions that will be credited toward, or required for, compliance with the State and federal ESAs and the NCCPA. USFWS, NMFS, and DFG will consider all proposed CALFED actions that would benefit or harm the MSCS's NCCP communities and evaluated species for purposes of determining whether CALFED complies with FESA, CESA, and NCCPA. CALFED actions, including ERP actions, that are not emphasized or refined in the MSCS may nonetheless be important for FESA, CESA, and NCCPA compliance.

It is not currently possible to identify precisely which agency or other entity will implement each of the CALFED actions and the measures in the MSCS. Many actions, such as those described in the Preferred CALFED Alternative for conveyance, will be implemented by State and federal agencies. Other actions, such as certain levee improvements, may be implemented by local districts in coordination with State or federal agencies. Still other actions, such as those in the ERP, could be implemented by private organizations working independently or in cooperation with one or more State or federal agencies. The precise role of the various implementing entities for CALFED, as well as for the MSCS and ASIPs, will be identified as implementation proceeds.

The CALFED agencies are exploring different methods of management and governance that will influence how CALFED actions are implemented. A discussion of governance and management is contained in the implementation plan.

6.3.2 STAGING OF CALFED ACTIONS FOR IMPLEMENTATION

As described in the main text of the Programmatic EIS/EIR, CALFED will be implemented in stages. Stage 1 comprises the first 7 years of the implementation period. CALFED actions to be implemented during Stage 1 may be defined in more or less detail at the programmatic level and evaluated at varying levels of specificity in the Programmatic EIS/EIR and the MSCS. For actions that require FESA, CESA, and NCCPA compliance, the implementing entity or entities will not be able to move through the simplified compliance process until sufficient information is available for USFWS, NMFS, and DFG to analyze fully the action's impacts on the species evaluated in the MSCS.

USFWS, NMFS, and DFG will develop an implementation timeline, or implementation milestones, to prioritize conservation measures to be included in the ASIPs for the bundles of CALFED actions to be implemented during Stage 1. The timeline, or milestones, may be included in an agreement regarding implementation of the MSCS, or in USFWS or NMFS programmatic biological opinions, either of which would be complete by the time the CALFED agencies issue the ROD and the NOD. (See Section 6.3.5 below.)

6.3.3 LINKING CALFED ACTIONS FOR IMPLEMENTATION AND THE IMPACT OF LINKAGE ON TAKE AUTHORIZATION

The CALFED agencies intend to link CALFED actions for purposes of implementation. For example, they expect to link implementation of certain conveyance actions with simultaneous implementation of certain ERP actions. If actions are linked temporally, the requisite project-level information will have to be developed to allow all such actions proceeding simultaneously to be evaluated in an ASIP.

If actions are linked for simultaneous implementation, USFWS, NMFS, and DFG can review the actions and their effects on the evaluated species collectively, where appropriate. For example, certain linked CALFED actions may have synergistic effects on the covered species that USFWS, NMFS, and DFG can evaluate together. Under such circumstances, USFWS, NMFS, and DFG can make their determinations under FESA, CESA, and NCCPA for the linked actions based on their overall beneficial and detrimental impacts to the evaluated species, rather than assessing the impacts of each action individually. This approach allows implementing entities to further simplify the compliance process for CALFED actions that are compatible or complementary from a biological standpoint.

For example, ERP actions may be linked with non-ERP actions to advance simultaneously CALFED's ecosystem objectives and other nonecosystem objectives (e.g., water quality, water supply reliability). This is not to say that the ERP actions will be used to avoid, minimize, and compensate for the adverse effects of other non-ERP actions—each CALFED action must avoid, minimize, and compensate for its adverse environmental effects. However, in determining whether the linked actions will jeopardize the continued existence or modify critical habitat of any listed species, USFWS, NMFS, and DFG can consider together the beneficial effects of the ERP actions and the potential adverse effects on fish and wildlife of the non-ERP action with its conservation measures. DFG can also consider the combined effects of ERP actions and non-ERP actions when it determines whether the linked actions together provide adequately for the conservation and management of State-covered species.

Ultimately, the breadth of any permit or authorization provided by USFWS, NMFS, and DFG will depend on how CALFED actions are grouped for implementation (i.e., which CALFED actions will proceed simultaneously, which actions have been successfully implemented previously). The scope of commitments USFWS, NMFS, and DFG provide to implementing entities will also depend on how actions are grouped for implementation and the level of success of previously implemented CALFED actions.

6.3.4 AGREEMENTS FOR IMPLEMENTATION

CALFED agencies that will implement CALFED actions will enter into an agreement for implementation of the MSCS at the time they issue the ROD and NOD. Through the agreement, the CALFED agencies will agree to adhere to the MSCS when implementing CALFED actions. This commitment will, necessarily, be described in broad terms because the implementing entities for specific CALFED actions have not yet been determined. Specific MSCS implementation requirements for individual CALFED actions will be identified through the ASIP process.

Under Section 7 of FESA, implementation of measures to minimize the impact of take on species becomes part of a permit or other grant from a federal agency, thereby ensuring implementation of the measures. Under the terms of Section 7, taking that is incidental to and not intended as part of an action is not prohibited, provided that such taking complies with the terms and conditions of an incidental take statement contained in a biological opinion. In most cases, a federal agency includes the terms and conditions contained in a biological opinion in any grant or permit (e.g., a CWA Section 404 permit) it issues to an implementing entity for the exemption in Section 7 to apply. In rare cases, a federal agency does not retain regulatory authority over an action that is covered by an incidental take statement and an agreement must be executed to ensure proper implementation. As USFWS and NMFS authorize incidental take for CALFED actions under Section 7, these agencies will develop the appropriate types of agreements to ensure implementation.

Some CALFED actions could involve nonfederal entities and not involve any federal land, funding, or approvals. In these instances, an HCP under FESA Section 10 may be required, as described in Section 6.2.1. Should an HCP that is not a low-effect HCP as described in the Habitat Conservation Planning Handbook (U.S. Fish and Wildlife Service and National Marine Fisheries Service 1996) be developed for CALFED actions, an implementing agreement (IA) will be developed to ensure proper implementation of the measures contained in the HCP. An IA identifies responsibilities for implementation of the conservation measures, binds the parties to their respective obligations, and specifies remedies should any party fail to perform its obligations. An IA may also specify USFWS's, NMFS's, and DFG's assurances regarding the sufficiency of conservation measures identified in the ASIP prepared for specific actions.

In the agreement among the CALFED agencies, each agency will commit itself to implement the MSCS in such a way that DFG can approve the MSCS as a programmatic NCCP. In addition, tiered IAs will be developed between DFG and the implementing entity for each specific CALFED action or group of actions to ensure that the action or group of actions is implemented in accordance with the MSCS. If either USFWS or NMFS issues a permit under Section 10 of FESA, a single IA will be developed to satisfy USFWS's, NMFS's, and DFG's respective needs under FESA and NCCPA.

6.3.5 COMMITMENTS

FESA compliance has been a source of discussion and concern among CALFED agencies, implementing entities, conservation organizations, private landowners, and other stakeholders. Stakeholders are variously concerned that CALFED will fail to achieve its ecosystem objectives or that it will be unable to obviate additional constraints on water use to benefit fisheries. In addition, private landowners are concerned that endangered species habitat restoration efforts on their land or adjacent land may subject them to unanticipated and unwelcome land use restrictions. Various stakeholders have therefore requested assurances that CALFED will address their concerns. To address this concern, the MSCS identifies program-level commitments, provides the basis for appropriate regulatory commitments to CALFED implementing entities, and creates a strategy for extending commitments to private landowners.

The very purpose and design of CALFED provides some assurance that stakeholders' concerns will be addressed. The CALFED mission is to develop a long-term comprehensive plan that will restore the Bay-Delta's ecological health and improve water management for beneficial uses of the Bay-Delta system. The objectives and solution principles developed for CALFED reflect this mission, and the Preferred CALFED Alternative was developed in accordance with these objectives and solution principles.

CALFED contains a number of elements that will serve both to achieve CALFED's ecosystem objectives and to obviate additional constraints on the use of water. These include the ERP, CMARP, and EWA, which are intended to restore the Bay-Delta ecosystem and to optimize conditions for fisheries. As the ERP, CMARP, EWA, and other important CALFED elements are finalized, funded and implemented, USFWS, NMFS, and DFG will rely increasingly on CALFED's environmental benefits when they assess the long-term effects of CALFED actions on evaluated species. As these benefits are realized, the potential adverse effects of some CALFED actions will likely become less significant. For example, as CALFED restores and enhances tidal freshwater emergent habitat, minor adverse effects on this type of habitat will present less of a threat to its long-term health and vitality. In short, the need for conservation measures that are new or different than the measures in the MSCS is expected to decrease as conditions for the evaluated species improve.

Accordingly, as CALFED progresses toward its ecosystem objectives, USFWS, NMFS, and DFG will be able to provide regulatory commitments with respect to individual CALFED actions or groups of actions. Before CALFED begins to implement the ERP, EWA, and other important elements, the commitments that USFWS, NMFS, and DFG can provide will be limited or qualified. However, USFWS, NMFS, and DFG will be able to provide increasing commitments over time as implementation proceeds and the MSCS and ERP goals are achieved.

Based on CALFED's progress in achieving its ecosystem objectives, USFWS, NMFS, and DFG will provide appropriate commitments regarding CALFED action(s) directly to the agency or other entity carrying out the action. The commitments will be based on the ASIP developed for the CALFED action in the MSCS's simplified permitting process. To the extent permitted by law, they will limit new or different conservation measures that would require additional commitments of land,

water, or financial compensation, or additional restrictions on the use of land, water, or other natural resources, beyond what is required in the ASIP. The specific scope and duration of USFWS's, NMFS's, and DFG's commitments will vary depending on the scope and duration of each CALFED action's impacts on covered species and whether the impacts will recur or continue over an extended period of time.

In addition, the MSCS provides the framework for making commitments to cooperating landowners that they will not be prevented from continuing their existing land uses because of the implementation of CALFED actions or MSCS conservation measures. Many landowners may be concerned that if the populations of threatened and endangered species increase within the Focus Area, FESA and CESA will restrict the use of land or water in or near the species habitat. Cooperating landowner programs are intended to address this concern and to preserve compatible land uses within the Focus Area. As described in Section 6.3.6.1, these programs will include protections for cooperating:

- farmers and ranchers who neighbor land preserved by CALFED agencies for wildlife conservation purposes;
- landowners or local public entities who maintain levees on which wildlife habitat will be created or enhanced under CALFED;
- landowners or local public entities who use or divert water from streams or rivers newly opened to anadromous fishes under CALFED; and
- landowners or local public entities who operate and maintain water diversions in which fish screens will be installed under CALFED.

6.3.6 COMMITMENTS TO CALFED AGENCIES AND OTHER ENTITIES IMPLEMENTING CALFED ACTIONS

USFWS's, NMFS's, and DFG's commitments to CALFED agencies and other implementing entities regarding requirements for additional conservation measures will be based substantially on CALFED elements such as the ERP, CMARP, and EWA. Until these elements are finalized, funded, and implemented, USFWS's, NMFS's, and DFG's commitments will be expressly linked to, or conditioned on, their subsequent implementation. However, USFWS, NMFS, and DFG will generally provide commitments as follows.

For CALFED actions in which there is discretionary federal involvement or control, USFWS and NMFS will provide commitments regarding requirements for additional conservation measures in biological opinions that they prepare pursuant to Section 7 of FESA. The biological opinions prepared for a CALFED action will address the evaluated species and designated or proposed critical habitat that may be affected by the CALFED action and can authorize incidental take of species that are listed or proposed pursuant to FESA. Each biological opinion will also contain the conservation

measures necessary to minimize the impact of take of potentially affected, unlisted evaluated species. If any of the unlisted evaluated species addressed in a biological opinion is subsequently listed pursuant to FESA, FESA regulations require the reinitiation of formal consultation under Section 7 should take authorization be requested. However, USFWS and NMFS expect that the technical assistance provided for unlisted evaluated species will be sufficient to allow the species to be included in the biological opinions as federally covered species without the addition of new conservation measures.

For CALFED actions in which there is no discretionary federal involvement or control, the entity implementing the action can be provided with assurances through the Section 10 process, in accordance with the federal "No Surprises" rule. Incidental take authority for these CALFED actions will be provided pursuant to Section 10 of FESA. The Section 10 incidental take permit and the "No Surprises" assurances regarding additional conservation measures will be based on the ASIP prepared for the CALFED action. The incidental take permit can authorize the take of both listed and unlisted (if and when they are listed) evaluated species that may be affected by the CALFED action. An IA will be developed to ensure proper implementation of the measures contained in the ASIP. In the IA, USFWS or NMFS, as appropriate, will identify any changed circumstances that may give rise to additional conservation requirements. In addition, USFWS or NMFS will assure the implementing entity that, consistent with the "No Surprises" rule, additional commitments of land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level provided for federally covered species in the ASIP and the IA will not be required without the implementing entity's consent.

For all CALFED actions, the State will provide commitments regarding additional conservation measures directly to the CALFED agency or other implementing entity based on the ASIP prepared for each action or group of actions. For all CALFED actions for which it approves an ASIP, DFG will provide incidental take authority pursuant to NCCPA. The NCCP incidental take authorization will authorize the take of both listed and unlisted State-covered species that may be affected by a CALFED action. An IA will be developed for each CALFED action or group of actions for purposes of the NCCP incidental take authorization. If USFWS or NMFS will issue a FESA Section 10 incidental take permit for the CALFED action, a single IA will be used for both State and federal incidental take authorizations. In the IA, DFG will identify the circumstances that may give rise to additional conservation requirements. For example, new or different measures will be required as necessary to prevent a CALFED action from jeopardizing the continued existence of a State-covered species. DFG will assure the implementing entity that, except in the identified circumstances, additional commitments of land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level provided for State-covered species in the ASIP and the IA will not be required without the implementing entity's consent.

6.3.6.1 COOPERATING LANDOWNER COMMITMENTS

CALFED agencies and other entities implementing CALFED actions are responsible for developing a means to provide appropriate cooperating landowner commitments necessitated by

those actions. Each implementing entity will include appropriate cooperating landowner protection measures and a plan for providing them in the ASIP prepared for the CALFED action to be implemented. Based on these measures, USFWS, NMFS, and DFG can authorize limited incidental take by cooperating landowners as necessary or appropriate to protect compatible existing uses of land and water that could be affected by the CALFED action or associated conservation measures.

Acceptance of cooperating landowner commitments will be strictly voluntary. Landowners and local public entities may withdraw from the cooperating landowner commitments program at any time without penalty. Cooperating landowner commitments will not create a new exception or exemption to the requirements of CESA or FESA. However, these commitments will be designed to minimize disincentives for withdrawal from participation.

The measures necessary to protect cooperating landowners will vary greatly with each CALFED action. Specific measures for individual actions or groups of actions will be developed jointly by the implementing entity and USFWS, NMFS, and DFG, in consultation with potentially affected cooperating landowners. However, the following guidelines apply to cooperating landowner commitments.

6.3.6.2 COMPATIBLE ACTIVITIES

Cooperating landowner commitments will extend only to land uses and activities that are compatible with the MSCS and CALFED. Activities that would undermine or nullify the environmental benefits of the MSCS and CALFED will not be authorized under the MSCS. In general, compatible activities are activities that will not degrade the existing environmental conditions for covered species and will not prevent the MSCS and CALFED from preserving or improving such conditions, or from achieving the goals of the ERP. A land use or activity that has minor adverse effects on covered species may be a compatible activity for purposes of cooperating landowner commitments if avoidance, minimization, and compensation measures for the adverse effects are included in the appropriate ASIP.

6.3.6.3 PRIVATE PROPERTY RIGHTS

CALFED agencies will fully respect the private property rights of landowners. Agency personnel will not enter private lands to implement CALFED actions or associated conservation measures without the express permission of the landowner.

6.3.6.4 MONITORING

Monitoring and site-specific surveys carried out on private land as part of CALFED or the MSCS will be conducted in the least intrusive manner practicable.

6.3.6.5 ROUTINE AND ONGOING AGRICULTURAL ACTIVITIES

Cooperating landowner commitments regarding agricultural activities will allow for the continuation of routine and ongoing agricultural activities on agricultural lands near land preserved by CALFED for wildlife conservation purposes. If necessary and appropriate, mitigation for incidental take of wildlife originating from preserved wildlife habitat will be provided by the appropriate CALFED agency or other implementing entity that carried out the action or associated conservation measure that resulted in the preservation of wildlife habitat.

6.3.6.6 LEVEE MAINTENANCE

Cooperating landowner commitments regarding levee maintenance can allow for both routine repair and maintenance and emergency repair and maintenance of levees. If necessary, mitigation for incidental take of wildlife resulting from repair and maintenance of levees on which wildlife habitat has been restored or enhanced will be provided by the CALFED agency or other implementing entity that carried out the action or associated conservation measure that resulted in the restoration or enhancement of wildlife habitat on such levees.

6.3.6.7 STREAMS NEWLY OPENED TO ANADROMOUS FISHES

Cooperating landowner commitments for landowners and local public entities who use or divert water from streams that have been newly opened to anadromous fishes will preserve existing, compatible uses to the greatest extent practicable. If necessary, the CALFED agency or other implementing entity will provide funds or assist the cooperating landowner to seek funds to mitigate for incidental take of fish resulting from the continuation of existing, compatible uses in such streams. For example, diverters with unscreened or poorly screened water intakes will be eligible for CALFED funds to pay for or install fish screens as necessary to preserve existing water divisions. For areas where opening habitat to anadromous fish is a high priority for the ERP, conservation measures to address potential incidental take in newly opened stream reaches will have a commensurate priority level.

6.3.6.8 INSTALLATION OF FISH SCREENS

Cooperating landowner commitments regarding the installation, operation, and maintenance of fish screens will preserve existing diversions to the greatest extent practicable. In addition, CALFED will provide funds or assist the cooperating landowner to seek funds to cover any incremental increase in the cost of operating and maintaining the diversion structure that is incurred because of the installation of the fish screens.

6.3.7 FUNDING

To comply with the NCCP guidelines, the MSCS must address how the strategy will be funded. As CALFED implementation proceeds, the ASIP will address funding of the conservation measures necessary to avoid, minimize, and compensate for any detrimental impact on the covered species and of the additional measures to enhance the condition of NCCP communities and evaluated species. The agency or entity initiating the ASIP will provide the funding for the conservation measures necessary to mitigate for CALFED impacts. Implementation of other conservation measures will be accomplished through the ERP, the CMARP, or another appropriate CALFED element.

Several funding strategies are being considered in CALFED's financing plan for the implementation of ecosystem restoration actions, both in the near term and throughout the 30-year program. The ecosystem restoration actions that are funded through one or more of the options below could be used to implement the conservation measures in the ASIP to enhance the condition of NCCP communities and evaluated species, rather than the measures necessary to avoid, minimize, and compensate for CALFED impacts.

- Option 1—Combine a broad-based diversion fee and public funding. Adopt a fee to allow program flexibility with multiple funding sources.
- Option 2—Rely on existing public funding sources and consider a user fee in the future only as needed.
- Option 3—Use a variation of Options 1 and 2. Impose additional cost-sharing requirements on diverters that receive funding for fish screens and ladders.

Greater detail on the above three options can be found in the "Financing Plan" section of the Programmatic EIS/EIR implementation plan appendix.

Figure 6-1. Programmatic Project-Level Compliance with FESA, CESA, and NCCPA

